Supreme Court, U.S.
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CLERK

No. 86-1155

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

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INTERNATIONAL PRIMATE PROTECTION LEAGUE, *et al.*,
*Petitioners*

v.

INSTITUTE FOR BEHAVIORAL RESEARCH, INC., *et al.*,
*Respondents*

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF FOR RESPONDENT INSTITUTE FOR BEHAVIORAL RESEARCH, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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February 4, 1987

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## COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. When a case involving federal question issues, and pendent state law issues, is removed by the United States from state court to federal court, and, without objection by any party, is considered by the federal court, and the federal court concludes that the plaintiffs (petitioners* here and appellants below) do not have standing to raise the federal issues, is it error for an appellate court to direct dismissal of the pendent state law issues without deciding them?

2. Whether a group of private plaintiffs have standing to bring a lawsuit challenging a medical researcher's compliance with federal standards for the care of laboratory animals?

3. Whether the trial judge's *de novo* review of the magistrate's report and recommendations is subject to constitutional challenge; and whether a Ninth Circuit decision involving only a *consensual case reference* to a magistrate involves a conflict with the Fourth Circuit's resolution of this case which involves only a *mandatory case reference* to a magistrate?

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* All of the petitioners, appellants and plaintiffs below, International Primate Protection League, *et al.*, are for clarity and simplicity sometimes hereinafter referred to as "Primate League."

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v.

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## BRIEF FOR RESPONDENT INSTITUTE FOR BEHAVIORAL RESEARCH, INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent, Institute for Behavioral Research, Inc., respectfully requests that the petition for writ of certiorari be denied.

### STATUTES AND RULES INVOLVED

28 U.S.C. § 1441(a) and 28 U.S.C. § 1441(c) (1982); 28 U.S.C. § 636(b)(1) (1982) and 28 U.S.C. § 636(c)(1) (1982) of The Federal Magistrate Act of 1979, 93 Stat. 643 (1979); Fed. R. Civ. P. 78; and Local Rule 6(G) of the United States District Court for the District of Maryland are reproduced in Appendix B.

## COUNTERSTATEMENT OF THE CASE

Respondent, Institute for Behavioral Research, Inc. ("IBR"),[1] objects to petitioners' statement of the case and refers this Court to the succinct statement of the case appearing at the beginning of the opinion of the court below. *See* Pet. App. 5-17.[2]

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[1] Respondent, Institute for Behavioral Research, Inc. ("IBR"), is a not-for-profit corporation incorporated under the laws of the District of Columbia. It has no parents, affiliates, subsidiaries, or shareholders. After the initiation of this litigation, its name was changed to Institutes for Behavior Resources, Inc.

[2] On August 10, 1983, when the Maryland Court of Appeals reversed the medical researcher's conviction on the last remaining of the original 17 counts, and directed that the information against him be dismissed, the previously entered Maryland court orders, relating to the custody of the primates, expired by their terms. Opinion 8, 10, Resp. App. 11, 16. All matters relating to the primates then became the sole concern of their owners, IBR and the National Institutes of Health ("NIH"), in whose custody they resided. NIH maintained the primates at their Poolesville, Maryland, animal facility.

After the United States District Court for the District of Maryland dismissed Primate League's Complaint, Primate League did not seek a stay, either in the District Court or in the Court of Appeals, and no stay was granted.

After submission of the case to the Court of Appeals on May 8, 1986, the primates were transferred by NIH from Poolesville, Maryland, to the Delta Primate Center in Covington, Louisiana. This transfer took place on or about June 23, 1986. Primate League apparently regarded the Delta Primate Center as unsuitable custodians and objected to the 90-day quarantine that was imposed upon the primates as newly arrived animals at the facility. In the Court of Appeals, Primate League sought, *inter alia*, a show cause order for return of the primates to Poolesville, Maryland, or a transfer of custody of the primates to their designee. The court below, having been advised that IBR, the owner of the primates, did not object to their transfer by NIH to the Delta Primate Center, denied the motion on September 3, 1986. The Opinion of the court below was handed down the following day, September 4, 1986.

Thereupon, appellants secured an extension of time to file a petition for "Rehearing and/or an Order Vacating, Withdrawing

## REASONS FOR DENYING THE WRIT

### I. AFTER HOLDING THAT PETITIONERS DID NOT HAVE STANDING TO RAISE THE FEDERAL QUESTION ISSUES, THE COURT BELOW PROPERLY EXERCISED ITS DISCRETION TO DISMISS, AND NOT DECIDE, THE PENDENT STATE LAW ISSUES

As the court below noted, the case involved federal question issues under the Animal Welfare Act, 7 U.S.C. § 2131 *et seq.*, and pendent state law issues. Opinion, Pet. App. 13, 33-34. The court held that petitioners did not have standing to raise the federal issues. Opinion, Pet. App. 17-33. Though the court below had authority to decide them, it properly declined to decide the pendent state law issues and directed their dismissal. The court had the option under 28 U.S.C. § 1441(a) of either dismissing the case or remanding the pendent state claims.

Neither Primate League nor respondent, Institute for Behavioral Research, Inc., opposed the removal by the United States pursuant to 28 U.S.C. § 1441(a) from the Circuit Court for Montgomery County, Maryland, to the United States District Court for the District of Maryland. Petition for Removal, Resp. App. A3.[3] Petitioners explained:

> "it appears that the same facts will be elicited for, or are necessary to, both federal and 'state' issues."

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and Modifying Opinion, and Other Relief; With Suggestion for Rehearing *en banc*" until September 22, 1986. When the petition was filed, no member of the Court of Appeals for the Fourth Circuit found any merit in it. The Petition was denied on October 7, 1986. Pet. App. 61-62.

[3] Petitioners, by not opposing petition for removal, consented to the court's hearing the case and cannot be heard to complain that they are dissatisfied with the result. Petitioners purported to attach various conditions to the removal but such unilateral action by them clearly could not preclude the court from exercising its discretion with respect to the ultimate disposition of the case.

Plaintiffs' Answer to Petition for Removal, Pet. App. 106.

After the removal, the case was referred to a magistrate, who received and considered extensive briefs submitted on behalf of all parties dealing with the issue of Primate League's standing to maintain the action. The magistrate issued an 11-page Report and Recommendation, concluding that Primate League lacked standing both with respect to the federal issues and the pendent state law issues. Pet. App. 44-57. The magistrate's decision was reviewed *de novo* and approved by the United States District Court judge. Pet. App. 59-60. Primate League then filed an extensive motion for reconsideration. The motion for reconsideration was subsequently denied by the District Court judge. Pet. App. 63-64.

On appeal, after ruling that petitioners did not have standing with respect to the federal issues, the Court of Appeals recognized that it was entitled to decide the pendent state law issues, Opinion, Pet. App. 34, *citing United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1965), but found that "state claims should usually be dismissed if the federal claims have been dismissed before trial." *Id.*

The Primate League argues that 28 U.S.C. § 1441(c) required remand of the pendent state issues rather than dismissal. 28 U.S.C. § 1441(c), however, does not even apply. As the Fourth Circuit has previously explained, where the state and federal claims arose from a "common nucleus of operative fact" and thus were properly removable to federal court under 28 U.S.C. § 1441(a), the alternative of dismissal in lieu of remand "clearly exists." *Fox* v. *Curtis*, 712 F.2d 84, 89 n.4 (4th Cir. 1983); Petition for Removal, Resp. App. A3. The Court noted that 28 U.S.C. § 1441(c), which gives discretionary authority to remand "separate and independent claims" removable only because of their joinder with removable claims, was inapplicable. *Id.* The courts that

have considered the question have agreed that this Court's opinion in *Gibbs* controls where the action is removed pursuant to 28 U.S.C. § 1441(a), and that dismissal is appropriate regardless of whether remand is also appropriate. *See, e.g., In Re Romulus Community Schools*, 729 F.2d 431, 436 (6th Cir. 1984) ("[w]e believe, following *Gibbs*, that the district court would have been clearly justified in dismissing the case" which had been removed pursuant to § 1441(a)); *Cook* v. *Weber*, 698 F.2d 907, 909-10 (7th Cir. 1983) (the district court, following *Gibbs*, properly exercised its discretion in dismissing pendent state claims removed pursuant to § 1441(a)).[4]

The federal and state claims, as the Primate League itself has pointed out (Plaintiffs' Answer to Petition for Removal, Pet. App. 106), involve "the same facts and transactions" and thus "[i]t cannot be said that there are separate and independent claims for relief as § 1441 (c) requires." *American Fire & Cas. Ins.* v. *Finn*, 341 U.S. 6, 16 (1950). In particular, Section 1441(c) is inapplicable because the claims are not "independent" given that complete relief cannot be afforded in the absence of some of the parties. C. Wright & A. Miller, 14A *Federal Practice and Procedure*, § 3724, at 362 & n.17 (1985 & Supp. 1986) (and cases cited); *see, e.g., Torrence* v. *Shedd*, 144 U.S. 527, 530 (1892).

In dismissing the pendent state law issues, the Court of Appeals (*see* Opinion, Pet. App. 33-34) followed the clear direction of this Court in *Gibbs*, 383 U.S. at 726, in which this Court explained:

> "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in consideration of judicial economy, convenience and fairness to liti-

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[4] The decisions relied upon by petitioners at page 55 of their petition do not address the propriety of dismissal, in lieu of remand, after removal pursuant to § 1441(a).

> gants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, *Erie R. Co.* v. *Tompkins*, 304 U.S. 64. Needless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law. *Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.*" (Emphasis supplied.)

Thus, the court's exercise of its discretion to dismiss, but not to decide, the pendent state law claims was an entirely proper disposition.

## II. THE COURT BELOW CONCLUDED THAT PRIVATE PARTIES DO NOT HAVE STANDING TO CHALLENGE A MEDICAL RESEARCHER'S COMPLIANCE WITH FEDERAL STANDARDS FOR THE CARE OF LABORATORY ANIMALS

Relying on *United States* v. *Richardson*, 418 U.S. 166, 174-75 (1974), Opinion, Pet. App. 18, the court below correctly concluded that Primate League's status as a taxpayer did not vest it with standing to enforce animal care regulatory requirements. Opinion, Pet. App. 18. Similarly, the court concluded that Primate League's voluntary efforts with respect to the research animals did not give them "a personal stake in the outcome of the controversy" sufficient to establish standing. Opinion, Pet. App. 19, *quoting Baker* v. *Carr*, 369 U.S. 186, 204 (1961).

The court below was entirely correct in concluding that an analysis of the Animal Welfare Act makes it clear that Congress had not intended "lawsuits by private individuals as a complement to the authority of the Secretary of Agriculture." Opinion, Pet. App. 32. If Primate League were found to have standing to challenge a medical researcher's compliance with federal standards

concerning the care of laboratory animals, standing would then be available to virtually all students and laboratory technicians working on research projects involving the use of animals. If standing could be so easily acquired, and by so many people, it would become a meaningless requirement. In the words of the court below the finding of standing in such circumstances "might unleash a spate of private lawsuits that would impede advances made by medical science in the alleviation of human suffering." Opinion, Pet. App. 6.

In reaching this conclusion, the court below justifiably relied on the *amicus curiae* brief submitted on behalf of 68 scientific and medical organizations. Opinion, Pet. App. 28. The court noted that *amici* predicted that "animal research will play some part in the prevention and treatment of such illnesses as multiple sclerosis, AIDS, and Alzheimer's disease." *Id.* at 29. The court's analysis of recent amendments to the Animal Welfare Act, in which there was a congressional finding that " 'the use of animals is instrumental in certain research, in education or for advancing knowledge of causes for treatments of diseases and injuries which affect both humans and animals' " led the court to conclude that the congressional goals could not be realized if private lawsuits interfering with vitally needed research were permitted. *Id.* (Citation omitted.)

## III. THE TRIAL JUDGE'S *DE NOVO* REVIEW OF THE MAGISTRATE'S RECOMMENDED DECISION IS NOT SUBJECT TO CONSTITUTIONAL CHALLENGE; AND THERE IS NO CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE NINTH CIRCUIT WITH RESPECT TO THE FEDERAL MAGISTRATE'S ACT OF 1979

1. Petitioners appear to contend in their fourth question presented for review, Pet. iii, that District Court Trial Judge John R. Hargrove impermissibly delegated authority to the magistrate to make a Report and Rec-

ommendation on the Motion to Dismiss filed under Fed. R. Civ. P. 12(b). However, there is no merit to this argument. 28 U.S.C. § 636(b)(1)(B) (1982) specifically authorizes a district court judge to refer dispositive motions to a magistrate. In such cases, the statute provides that a "judge of the court shall make a *de novo* determination[5] of those portions of the report . . . or recommendations to which objection is made." This procedure, scrupulously followed in this case, Pet. App. 59-60, 63-64, has been specifically sanctioned by this Court in *United States* v. *Raddatz*, 447 U.S. 667, 674 (1980).[6]

2. Contrary to the assertions at page 64 of the Petition, there is no conflict involving the interpretation of the Federal Magistrate Act of 1979, 93 Stat. 643, between the Ninth Circuit decision in *Pacemaker Diagnostic Clinic of America* v. *Instromedix*, 725 F.2d 537 (9th Cir. 1984), *cert. denied*, 469 U.S. 824 (1985), and the decision of the Fourth Circuit in this case.

As noted above, this case involved a mandatory referral to a magistrate, under 28 U.S.C. § 636(b)(1), and a subsequent *de novo* determination of the magistrate's recommendation by a United States District Court judge. *See* Pet. App. 59-60, 63-64. The decision in *Pacemaker* did not involve a *mandatory* referral under 28 U.S.C. § 636(b)(1), but rather a *consensual* case reference by the parties to a magistrate under 28 U.S.C. § 636(c)(1), and thus *Pacemaker* could not involve a holding in conflict with the decision below.

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[5] Making "a *de novo* determination" has been equated with making "a *de novo* review." *See Thomas* v. *Arn*, 106 S. Ct. 466, 474-75 (1985).

[6] As to the complaint that the case was heard without oral argument, implementing Fed. R. Civ. P. 78, Local Rule 6(G) of the United States District Court for the District of Maryland expressly provides in pertinent part that "[a]ll motions shall be decided on the memoranda filed with the Clerk unless otherwise ordered by the Court."

## CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 4, 1987

* Counsel of Record

# APPENDICES

# APPENDICES

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

---

Civil Action No. 81-3246

INTERNATIONAL PRIMATE
PROTECTION LEAGUE, a non-
profit corporation
Headquarters
Summerville,
South Carolina 29483

and

ANIMAL LAW ENFORCEMENT
ASSOCIATION, a corporation
c/o Jo Shoesmith
14120 Whispering Pines Court
Silver Spring, Maryland 20906

and

PEOPLE FOR ETHICAL TREATMENT
OF ANIMALS, INC., a corporation
209 Spring Avenue
Takoma Park, Maryland 20912

and

ALEX HERSHAFT
10005 Clue Drive
Bethesda, Maryland 20834

and

PAMELA CHAPMAN
3507A Hutch Place
Chevy Chase, Maryland 20815

and

JO SHOESMITH
14120 Whispering Pines Court, #32
Silver Spring, Maryland 20906

and

VIRGINIA BOURQUARDEZ
2913 Woodstock Avenue
Silver Spring, Maryland 20910

and

PETER W. SOLEM, Esq.
and BERTHA K. SOLEM
5714 Wilson Lane
Bethesda, Maryland 20834

and

SHERRYL R. THOMAS
7411 Glenside Drive
Takoma Park, Maryland 20912

for themselves and the class,
*Plaintiffs*

v.

INSTITUTE FOR BEHAVIORAL
RESEARCH, INC., a corporation
or its successors in interest
and as agents and officers
2429 Linden Lane
Silver Spring, Maryland 20910
or, c/o
ANIMAL LABORATORY
9162 Brookville Road
Silver Spring, Maryland 20910
or, c/o
JAMES R. MILLER, Esq.
414 Hungerford Drive
Rockville, Maryland 20850

and

RICHARD W. SWAIN, JR.
Sergeant, Montgomery
County Police
801 Sligo Avenue
Silver Spring, Maryland
c/o State's Attorney's Office
Attn: Roger Galvin, Esq.
Rockville, Maryland 20850

and

JAMES V. STUNKARD, D.V.M.
3428 Crain Highway
Bowie, Maryland
and c/o JAMES R. MILLER, Esq.
414 Hungerford Drive
Rockville, Maryland 20850

and

NATIONAL INSTITUTES OF HEALTH,
ANIMAL LABORATORY
Poolesville, Maryland,
a branch of the PUBLIC HEALTH
SERVICE, DEPARTMENT OF HEALTH
AND HUMAN SERVICES
c/o Officer in Charge
Poolesville Facility
Poolesville, Maryland
and c/o Shelley Steuer,
Attorney Advisor
9000 Rockville Pike
Bethesda, Maryland 20205

and their successors,

*Defendants*

---

Filed December 17, 1981

R. 1

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## PETITION FOR REMOVAL

Your Petitioner, NATIONAL INSTITUTES OF HEALTH, an Agency of the United States of America, by its attorneys, J Frederick Motz, United States Attorney for the District of Maryland and Lynne A. Battaglia, Assistant United States Attorney for said District, respectfully states:

1. There is now pending in the Circuit Court for Montgomery County, Maryland, a civil action entitled International Primate Protection League, et al. v. Institute for Behavioral Research, Inc., et al., in which the National Institute of Health is one of the defendants. The Equity Number assigned to the suit in Montgomery County is 77895. According to the Motions to Shorten Time, for Show Cause Order, and with Request for Expedited Hearing on Motion for Preliminary Injunction filed therein, the National Institute of Health was served with the pleadings on Monday, December 7, 1981.

2. The United States District Court for the District of Maryland has original jurisdiction to consider this action under 28 U.S.C. Section 1346(a)(2) on the basis of an alleged contract with the United States, and the suit heretofore filed in the Circuit Court for Montgomery County is therefore removable under 28 U.S.C. Section 1441(a), which expressly grants original jurisdiction to the various United States District Courts to hear such actions.

3. This action may be removed without bond pursuant to 28 U.S.C. Section 1446 as it is a petition on behalf of the United States for removal of a civil action.

4. Attached to this Petition, pursuant to 28 U.S.C. Section 1446(a), are copies of all papers served upon the National Institute of Health with respect to this action.

WHEREFORE, your Petitioner respectfully requests that the captioned case now pending in the Circuit Court

for Montgomery County, Maryland, Equity No. 77895, be removed therefrom to the United States District Court for the District of Maryland.

Respectfully submitted,

J. Frederick Motz
United States Attorney

By: /s/ Lynne A. Battaglia
LYNNE A. BATTAGLIA
Assistant U.S. Attorney
101 W. Lombard Street
Baltimore, MD 21201-2692
(301) 539-2940

SUBSCRIBED AND SWORN TO before me this 17th day of December, 1981.

/s/ [Illegible]
Notary Public
My Commission Expires: 7/1/82

## APPENDIX B

1. 28 U.S.C. § 1441. Actions Removable Generally

28 U.S.C. § 1441(a) (1982)

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(c) (1982)

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

2. The Federal Magistrate Act of 1979

28 U.S.C. § 636(b)(1) (1982)

(b)(1) Notwithstanding any provision of law to the contrary—

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to in-

voluntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. § 636(c)(1) (1982)

(c) Notwithstanding any provisions of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

3. Fed. R. Civ. P. 78.

Rule 78. Motion Day

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

4. Local Rule 6(G) of the United States District Court for the District of Maryland

> (G) All motions shall be decided on the memoranda filed with the Clerk unless otherwise ordered by the Court. Where the motion has been decided on memoranda without a hearing, the Clerk will notify all parties of the decision.